SECOND DIVISION
July 29, 2014

No. 1-13-1150

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARSHALL SPIEGEL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 08 L 13286
	)	
KROHN & MOSS, LTD., ADAM KROHN,	)	
GREGORY MOSS, and ALEX WEISBERG,	)	Honorable
	)	James E. Sullivan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Harris and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court's judgment in favor of defendants on plaintiff's legal malpractice claim is affirmed because the court's finding that defendants were not negligent was not against the manifest weight of the evidence.

¶ 2 After a bench trial, the circuit court entered judgment in favor of defendants Krohn & Moss, Ltd., Adam Krohn, Gregory Moss, and Alex Weisberg[1] (collectively, defendants) on plaintiff Marshall Spiegel's (Spiegel) claim for legal malpractice. For the following reasons, the circuit court's judgment is affirmed.

¶ 3 BACKGROUND

¶ 4 Spiegel brought this legal malpractice action against defendants based on their representation of him in a Magnuson-Moss Warranty Act (15 U.S.C. § 2301 *et seq.*) breach of warranty action against Volvo Cars North America, LLC (Volvo) involving Spiegel's Volvo automobile. In the underlying breach of warranty action, defendants prepared Supreme Court Rule 213 witness disclosures for expert Tom Walters and Spiegel. Defendants had disclosed both as witnesses who would testify at trial on the diminished value of Spiegel's vehicle.

¶ 5 Defendants ultimately withdrew their representation prior to trial due to a conflict, and Spiegel retained a new law firm to handle the breach of warranty matter, including the bench trial. Before trial, Volvo moved *in limine* to bar Walters's opinion testimony concerning the value of Spiegel's vehicle. The trial court apparently granted the motion and barred Walters's testimony on that topic, but Spiegel has not directed us to a ruling on Volvo's motion in the record. Because the court barred Walters's testimony, Spiegel was the only witness to testify as to the diminished value of his automobile.

¶ 6 The jury awarded Spiegel damages, and the trial court entered judgment in favor of Spiegel, but the appellate court reversed on appeal. See *Spiegel v. Volvo Cars North America, LLC*, No. 1-05-2789 (2006) (unpublished order under Supreme Court Rule 23) (*Spiegel* Order). Concluding that Spiegel did not lay adequate foundation for his testimony regarding the value of

[1] Prior to trial, the circuit court entered summary judgment in favor of defendant Alex Weisberg. Spiegel has not appealed that ruling.

his automobile, the appellate court held that Spiegel "failed to prove a *prima facie* claim of breach of implied warranty of merchantability," thereby requiring a reversal. *Id.* at 8-9.

¶ 7 After losing the underlying breach of warranty action on appeal, Spiegel initiated the present legal malpractice action against defendants, contending that they failed to exercise a reasonable degree of care and skill in disclosing Walters's opinion testimony during discovery and knew or should have known that Spiegel, as a lay witness, would not be able to establish the foundation for an opinion on the diminished value of his vehicle.[2] According to Spiegel, defendants failed to comply with Rule 213 in disclosing Walters's opinion testimony, which caused the trial court to bar his testimony on the vehicle's diminished value. As a result, in the absence of Walters's testimony, Spiegel was the only witness to testify as to his vehicle's value. But because the appellate court determined that Spiegel had not established an adequate foundation for his testimony, he ultimately lost the underlying action on appeal.

¶ 8 In the malpractice action, the circuit court held a bench trial and heard testimony from several witnesses, including fact and expert witness testimony on whether defendants breached the standard of care. The relevant testimony to this appeal is addressed more fully below. After reviewing the evidence, the court found that Spiegel "failed to sustain his burden of proof" and that "Defendants' actions did not rise to a level of negligence sufficient to constitute legal malpractice." The circuit court entered judgment in favor of defendants on March 11, 2013, and awarded defendants costs on May 22, 2013. Spiegel timely filed his notice of appeal on April 4,

[2] Spiegel's precise arguments related to defendants' disclosure of him as a witness are unclear. From what we can discern from his briefing and the allegations in his amended complaint, Spiegel appears to contend that defendants additionally were negligent because they identified him as a witness even though they knew or should have known that he lacked the requisite knowledge to testify as to the diminished value of his automobile. His arguments on appeal, however, primarily focus on whether defendants breached the standard of care in preparing the Walters witness disclosure.

2013, and his amended notice of appeal on June 3, 2013. We have jurisdiction pursuant to Supreme Court Rules 301 and 303.[3]

ANALYSIS

¶ 9 Spiegel contends that the circuit court erred because he "presented sufficient evidence to establish that [defendants] violated the standard of care" by making "an insufficient disclosure" under Supreme Court Rule 213 for Walters's opinion testimony. Further, he maintains that defendants cannot establish that they complied with the standard of care by disclosing Spiegel as a witness because he lacked sufficient foundation to offer such testimony. In response, defendants argue that the circuit court's finding that they were not negligent was not against the manifest weight of the evidence. Alternatively, defendants posit that Spiegel's malpractice claim also fails because (1) he did not establish that defendants' alleged negligence proximately caused Spiegel's damages; (2) he could not prove the amount of his damages; or (3) the claim is barred by one of defendants' affirmative defenses (*i.e.*, either the statute of limitations or Spiegel's alleged release of all legal claims against defendants). Because we conclude that the circuit court did not err in finding that defendants were not negligent, we do not reach the additional issues raised by the parties.

¶ 10 To prevail on a claim of legal malpractice, a plaintiff must prove the following: "(1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) damages." *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 196 (1st

[3] We note that Spiegel's jurisdictional statement in his opening brief fails to comport with Supreme Court Rule 341(h)(4)(ii), which requires that the statement include "the supreme court rule or other law which confers jurisdiction upon the reviewing court" and "the facts of the case which bring it within this rule or other law." Both are absent from Spiegel's statement.

Dist. 2007). However, "an attorney is liable to his client only when he fails to exercise a reasonable degree of care and skill[.]" *Smiley v. Manchester Insurance & Indemnity Co.*, 71 Ill. 2d 306, 313 (1978).

¶ 11 As an initial matter, the parties dispute the appropriate standard of review of the circuit court's decision. Relying on *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195 (2006), Spiegel argues for a *de novo* standard of review. According to Spiegel, a judge would decide whether a witness disclosure was sufficient and whether testimony was supported by adequate foundation. Thus, Spiegel contends, because his malpractice claim involves these issues, whether defendants breached the standard of care in this case presents a question of law. Defendants, on the other hand, maintain that we should review the circuit court's judgment under a manifest weight of the evidence standard. We agree with defendants.

¶ 12 Contrary to Spiegel's contention, the ultimate inquiry is not whether the Walters disclosure comported with Supreme Court Rule 213 or whether Spiegel could offer lay opinion testimony, but rather is whether defendants "exercised a reasonable degree of care and skill" in representing Spiegel. That inquiry presents a question of fact: " 'In Illinois the question of whether a lawyer has exercised a reasonable degree of care and skill in representing and advising his client has always been one of fact.' " [Citation.] *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122, ¶ 30. Further, this fact question "must generally be determined through expert testimony and usually cannot be decided as a matter of law." *Id.* Indeed, during the bench trial, plaintiff presented his own expert testimony on the standard of care and argued that whether the court "agree[d] or disagree[d] with [the expert's] opinion" was "ultimately what [the court was] going to decide at the end of the case."

¶ 13 *Governmental Interinsurance*, cited by Spiegel, is not to the contrary. There, the court addressed the standard of review for the proximate cause element in an *appellate* legal malpractice action. Recognizing that "[g]enerally, the issue of what is the proximate cause of an injury is a question of fact," the court held that proximate cause in appellate legal malpractice actions, in contrast, presents a legal question for the court: "[T]he issue of proximate cause in an appellate legal malpractice action is inherently a question of law for the court and not a question of fact for the jury." *Id.* at 214.

¶ 14 We disagree with Spiegel that, under *Governmental Interinsurance*, the standard of care issue in this case must be a question of law subject to *de novo* review. In *Governmental Interinsurance*, the plaintiffs were required to prove that, but for their attorneys' negligence (*i.e.*, the failure to perfect the appeal in the underlying litigation involving the Tort Immunity Act), they would have prevailed on appeal. In other words, "the success of plaintiffs' legal malpractice action rest[ed] upon the question of how the appellate court *** would have interpreted the Tort Immunity Act" on appeal. *Id.* at 211-12. Because this proximate cause issue was limited to how the appellate court in the underlying litigation would have ruled, the court in *Governmental Interinsurance* explained that "[t]he issue of proximate cause in an appellate legal malpractice action 'must *** be made by the trial judge as an issue of law, based on review of the transcript and record of the underlying action, the argument of counsel, and subject to the same rules of review as should have been applied to the [underlying] appeal." *Id.* at 212 (quoting 3 R. Mallen & J. Smith, Legal Malpractice § 30.52, at 1257 (2005)). Thus, the "very nature of appellate review" required addressing this particular proximate cause determination as a question of law:

> "To rule otherwise—and hold that a jury should decide how an appellate court would have ruled—would misconstrue the very

> nature of appellate review. Appellate courts decide matters as 'issue[s] of law, based upon review of the transcript and *** the arguments of counsel.' [Citations.]" *Id.* at 213 (quoting *Tinelli v. Redl*, 199 F.3d 603, 607 (2d Cir. 1999)).

¶ 15 The instant case, however, presents a different issue; namely, whether defendants acted with a reasonable degree of care and skill in disclosing Walters and Spiegel as witnesses who would provide testimony as to the diminished value of Spiegel's vehicle. Again, Illinois courts typically treat this issue as one of fact, *Nelson*, 2013 IL App (1st) 123122, ¶ 30, and we see no reason to depart from this general rule in this case. Therefore, we will review the circuit court's findings with respect to whether defendants breached the standard of care under the general standard of review for the bench trials: the manifest weight of the evidence standard. *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35 (" 'When a party challenges a trial court's bench-trial ruling, we defer to the trial court's factual findings unless they are contrary to the manifest weight of the evidence.' " [Citation.]).

¶ 16 Under this standard, we must affirm the judgment of the circuit court unless "the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best*, 223 Ill. 2d 342, 350 (2006). We will defer "to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses." *Id.* Thus, we "will not substitute [our] judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn." *Id.* at 350-51. Nor will we "disturb the findings and judgment of the trier of fact 'if there is any evidence in the record to support such findings.' " *Staes & Scallan*, 2012 IL App (1st) 112974, ¶ 35 (quoting *Brown v. Zimmerman*, 18 Ill. 2d 94, 102 (1959)).

¶ 17 Turning to the merits, Spiegel argues that the circuit court "committed reversible error" because he "presented overwhelming evidence" of defendants' legal malpractice. Spiegel's arguments, however, overlook our standard of review. The issue is not whether *Spiegel* presented sufficient evidence to support a malpractice claim but whether sufficient evidence supported the trial court's finding defendants were not negligent. See *id.* Based on our review of the record and the parties' arguments, we find no error.[4]

¶ 18 Under former Supreme Court Rule 213(g)—which was in effect at the time defendants submitted the Walters disclosure—a disclosure of opinion testimony required the following: "(i) the subject matter on which the opinion witness is expected to testify; (ii) the conclusions and opinions of the opinion witness and the bases therefore; and (iii) the qualifications of the opinion, and provide all reports of the opinion witness." See *Becht v. Palac*, 317 Ill. App. 3d 1026, 1036 (1st Dist. 2000) (quoting former Rule 213(g)). Moreover, "lay witnesses are permitted to give their opinion as to the value of property if they have sufficient personal knowledge of the property and its value." *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 109 (2006). Here, sufficient evidence supports the circuit court's finding that defendants did not breach the standard of care in preparing the Walters disclosure and identifying Spiegel as a witness.

¶ 19 Scott Cohen, an attorney at Krohn & Moss, testified as an expert for defendants. According to Cohen, he has handled thousands of Illinois Supreme Court Rule 213 witness disclosures in Magnuson-Moss Warranty Act actions in addition to three appeals involving such disclosures. Cohen addressed both the Walters and Spiegel witness disclosures. He testified that, in his opinion, the Walters disclosure comported with the standard of care for Rule 213

[4] After briefing was complete, defendants filed a motion to strike certain portions of Spiegel's reply brief. We allowed briefing on the motion but denied it in a separate order dated July 8, 2014. We are mindful that, under Supreme Court Rule 341(h)(7), "[p]oints not argued [in the appellant's brief] are waived and shall not be raised in the reply brief."

disclosures because it disclosed "the subject matter of [Walters's] opinions as to diminished value," and Walters's accompanying expert report disclosed his "opinions and conclusions," including that the value of the vehicle was reduced by 40 percent. Further, according to Cohen, the disclosure also identified the "basis of [Walters's] opinions"—*i.e.*, "trade evaluation guides" and "comparisons to other vehicles"—as well as his qualifications—*i.e.* "that he was an ASE Certified Master Technician." Lastly, Cohen noted that Walters's report "was attached to the disclosure." Based on our review of the record, Cohen's testimony comports with Walters's disclosure and his expert report.

¶ 20 Cohen additionally discussed defendants' witness disclosure for Spiegel's lay testimony on the diminished value of his automobile. Specifically, Cohen testified that the Spiegel disclosure "exceeded the standard of care" because it "went above and beyond" disclosing the subject matter of his testimony by also including "the opinion, the basis of the opinion, [and] that it would rely upon [the Kelly] Blue Book [and] his experience buying and selling cars."

¶ 21 During the bench trial, defendants also presented fact testimony from attorneys who had litigated other Magnuson-Moss Warranty Act cases against defendants involving similar Rule 213 disclosures for Tom Walters. Aimee Schatz, a partner at the law firm of Kopka, Pinkus, Dolin, and Eads, testified for defendants. Schatz stated that her primary responsibilities at her firm involve Magnuson-Moss Warranty Act litigation and that she has represented automotive manufacturers in at least one thousand of those types of cases. According to Schatz, she has defended at least several hundred cases brought by Krohn & Moss, including cases where Walters was a disclosed expert. Schatz testified that the format for the Walters witness disclosure in the underlying case was "identical" to disclosures she has seen for Walters in other cases. "The only difference," Schatz explained, "is the specific vehicle and the opinions stated in

the opinion section." Schatz also testified that she previously had moved to bar Walters's testimony where the disclosure was "similar" to that in the underlying action, but she had not been successful. Schatz further compared Volvo's motion to bar in the underlying case with an unsuccessful motion she had filed to bar Walters's testimony, explaining that the "basis was nearly identical in the motion that [she] filed."

¶ 22 Attorney Timothy Hoffman also testified for defendants. Hoffman is a litigator at Sanchez, Daniels & Hoffman, and his practice has focused primarily on automotive litigation, including breach of warranty claims under various state "Lemon Laws" and the Magnuson-Moss Warranty Act. Hoffman testified that, while litigating cases against Krohn & Moss, he has seen Rule 213 disclosures for Walters in hundreds of cases. Those disclosures, he stated, "all appear very similar" to the disclosure in the underlying Volvo case "in both format and substance." Specifically, Hoffman stated that the "Qualifications of Opinion Witness" section in the Walters disclosure in the underlying case was "similar" to qualifications for Walters that Hoffman had seen in other cases. Likewise, the "Opinions and Conclusions of Opinion Witness" section of the Walters disclosure was "substantially the same" as those he had seen from other cases involving Krohn & Moss. According to Hoffman, he attempted to bar Walters's testimony on the diminished value of an automobile based on its substance, not the disclosures, approximately four or five times but was never successful.

¶ 23 We find that the above testimony, along with the relevant caselaw, sufficiently supports the trial court's finding that defendants were not negligent. First, based on defendants' expert and fact witness testimony, the court reasonably could conclude that defendants acted reasonably in disclosing Walters's opinion testimony. Spiegel's arguments to the contrary are unpersuasive. According to Spiegel, "who cares what these other attorneys believe *** because they are

obviously wrong." He contends that whether similar disclosures sufficed in other cases is irrelevant to his legal malpractice claim because "[m]aybe in all the other cases the disclosures were insufficient and the trial judges that let the insufficient disclosures slide were wrong." We disagree.

¶ 24 Evidence that similar disclosures for Walters passed muster in other cases is relevant for determining whether defendants, in preparing the Walters disclosure in the underlying case, exercised a reasonable degree of care and skill. See *Smiley*, 71 Ill.2d at 313 ("[A]n attorney is liable to his client only when he fails to exercise a reasonable degree of care and skill[.]"). Moreover, to the extent that Spiegel attempts to challenge the admissibility of the above testimony, his arguments are undeveloped and not supported by any authority or citations to the record. As a result, they are waived. *Sexton v. City of Chicago*, 2012 IL App (1st) 100010, ¶ 79 ("It is axiomatic that '[a] reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments,' [citation] and that failure to develop an argument results in waiver.").

¶ 25 Nor does *Huelsmann v. Berkowitz*, 210 Ill. App. 3d 806 (5th Dist. 1991), cited by Spiegel, compel the conclusion that defendants were negligent in preparing the Walters disclosure. *Huelsmann* was a medical malpractice action where the defendant's expert disclosure under former Supreme Court Rule 220(c)(1)[5] "effectively excluded the expert's opinions and the basis for his opinions" and "was no more than a blanket statement that defendant's expert would testify favorably for the defendant." *Id.* at 810. Here, we agree with defendants that their disclosure of Walters's testimony provided greater specificity than the disclosure at issue in *Huelsmann*, including disclosing Walters's opinion that the defects in Spiegel's vehicle would have reduced the purchase price by 40%. Moreover, as explained above, whether defendants

[5] The 1995 amendments to the Supreme Court Rules (effective January 1, 1996) replaced Rule 220 with Rule 213.

comported with the standard of care in drafting the Walters disclosure presents a question of fact. Thus, while *Huelsmann* offers guidance into the level of detail required for a sufficient disclosure under former Rule 220, it does not establish that defendants in this case acted unreasonably as a matter of law in disclosing Walters.

¶ 26 Second, to the extent that Spiegel also alleges that defendants were negligent by identifying him as a witness when they knew or should have known that he lacked sufficient foundation to testify as to the diminished value of his automobile, the circuit court did not err in rejecting this negligence theory. As our supreme court acknowledged in another Magnuson-Moss Warranty Act case involving the diminished value of an automobile, "lay witnesses," such as Spiegel, "are permitted to give their opinion as to the value of property if they have sufficient personal knowledge of the property and its value." *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 109 (2006). Indeed, the appellate court in the underlying action explicitly accepted this established principle in assessing the foundation for Spiegel's testimony. *Spiegel* Order at 8 ("A lay witness may give testimony regarding the diminished value of personal property."). Thus, we agree with defendants that their additional witness disclosure for Spiegel supports, rather than refutes, the circuit court's finding that defendants were not negligent. We have considered Spiegel's remaining arguments and find that they neither alter our conclusion nor require further discussion.

¶ 27 Because we find no reversible error in the circuit court's finding that defendants were not negligent, we do not reach the additional issues raised by the parties. For the above reasons, the circuit court's judgment is affirmed.

¶ 28 Affirmed.